

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	WC Docket No. 11-59
	)	
Acceleration of Broadband Deployment	)	
Expanding the Reach and Reducing the Cost	)	
of Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way and	)	
Wireless Facilities Siting	)	

**REPLY COMMENTS OF  
THE SANTA FE IRRIGATION DISTRICT**

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## SUMMARY

The telecommunications industry's opening comments illustrate the troubling breadth of the Commission's inquiry here. The comments ask the Commission to require access to publicly-owned property at federally regulated rates, and in accordance with Commission-dictated processes and timetables—and they do so while recognizing few or no limiting principles on the FCC's authority. The Santa Fe Irrigation District, a public water agency, files these reply comments to show that the industry's requests seek relief that the agency cannot lawfully grant; defy basic market principles; and are likely to deter rather than encourage broadband deployment.

While the District's primary mission is to provide water service—it currently serves nearly 20,000 people—the District is also considering leasing or licensing space on certain parts of its property to wireless communications service providers at market-based rates. The District would do so by entering into lease/license agreements that establish how these entities may use the District's property. These would be proprietary, not regulatory, leases/licenses that would be indistinguishable in critical respects from private leases/licenses for access to privately-owned property. Such agreements would be necessarily ancillary to the District's duty to provide water and to maintain the associated infrastructure—a service that is, frankly, far more vital than broadband infrastructure.

The Commission cannot and should not interfere with the District's basic property rights. Any Commission efforts to do so—or any action that calls into question the enforceability of voluntarily-negotiated agreements—could obstruct the District's operations, increase public safety risks, and undermine a system that is currently promoting broadband deployment. This would leave entities like the District with little choice but to avoid licensing/leasing altogether.

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The Santa Fe Irrigation District, a public water agency, files these reply comments in the above-captioned proceeding. Contrary to any implications in the industry's comments, the Commission may not and should not interfere with the District's control of its property.

**I. BACKGROUND**

**A. Santa Fe Irrigation District**

Santa Fe Irrigation District is a California special district authorized under the California Irrigation District Law.<sup>1</sup> The District's property consists of water tanks, treatment facilities, pump stations, administrative buildings, maintenance yards and facilities, pipeline infrastructure located in easements and in public rights-of-way, and excess property that it owns in fee. The system distributes water across a 16 square mile service area to nearly 20,000 persons. The District is governed by a five-member Board of Directors selected by voters to serve four-year terms.

While the District is a governmental entity, it is not like a Home Rule municipality, which has broad authority to regulate land use, and to exercise the police power. Rather, the

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<sup>1</sup> Cal. Water Code §§ 20500 *et seq.*

District has those powers specifically granted by California law and those powers necessarily implied from the specific grants. While the District has easements and rights-of-way, this property is not generally open to the public for transit, or to public use in the same way as a street; many of the easements and rights-of-way are subject to use restrictions. Likewise, its property is essentially operated as private property. This is reflected in the grant of powers to the District under California law: the District has, among other things, the power to “lease part or all of its works whenever the leasing will benefit the district.”<sup>2</sup> To maximize the use of the District’s facilities for beneficial purposes, the District is considering leasing and licensing the use of property which it owns in fee to wireless communications service providers. The District would use the funds that it collects through these agreements to lower customer rates or to improve and maintain infrastructure.

**B. The Commission’s Acceleration of Broadband Deployment Notice of Inquiry.**

The Commission inquires about State and local entities’ wireless facilities siting practices to determine whether federal regulation is necessary to accelerate broadband deployment.<sup>3</sup> Specifically, the Commission asked “whether there is a need for coordinated national action to improve . . . wireless facilities siting policies,”<sup>4</sup> and it requested information about the attachments to a range of facilities including “utility poles, water towers, billboards, and buildings, as well as to communications towers, both within and outside of established rights of

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<sup>2</sup> Cal. Water Code § 22526. *See also* Cal. Water Code §§ 22230, 22437.

<sup>3</sup> *In re Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, WC Docket No. 11-59, FCC 11-51 (Apr. 7, 2011) (the “NOI”).

<sup>4</sup> NOI ¶ 9.

way.”<sup>5</sup> The Commission did not only ask about local regulatory actions; it also raised questions that go directly to the control of property that government agencies own and operate in a proprietary capacity. For example, the Commission suggested that “fragmented property ownership creates a patchwork of requirements” that providers must satisfy on a piecemeal basis.<sup>6</sup> The Commission inquired whether “‘market based’ rates for use of . . . publicly-owned wireless facilities sites” are reasonable,<sup>7</sup> and whether processes should be “streamlined in certain situations, such as where an infrastructure provider seeks to collocate new facilities on an existing tower.”<sup>8</sup> In response, among other things, the communications industry’s opening comments urge the Commission to mandate collocation “by right,”<sup>9</sup> and to use the Communications Act to limit the fees that State and local entities can charge the communications industry for the use of their property.<sup>10</sup> The industry criticizes not only local regulation, but also prices charged by all types of public entities, including special districts.<sup>11</sup> The industry appears to suggest that it can directly attack, and the Commission can rewrite, contracts entered into

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<sup>5</sup> NOI ¶ 3 n.6.

<sup>6</sup> NOI ¶ 4. Property rights are of course protected by the Fifth Amendment to the Federal Constitution, and this “fragment[ation]” necessarily follows from private land ownership (no fragmentation would exist if the federal government owned all land). To base federal regulatory authority on the need to undo the “problem” created by essential Constitutional rights turns the notions of limited federal government powers and limited agency authority upside down.

<sup>7</sup> NOI ¶ 16.

<sup>8</sup> NOI ¶ 14.

<sup>9</sup> *See, e.g.*, Comments of PCIA—The Wireless Infrastructure Association and the DAS Forum (A Membership Section of PCIA), WC Docket No. 11-59 at 39 (July 18, 2011).

<sup>10</sup> *See, e.g.*, Comments of Level 3 Communications, LLC, WC Docket No. 11-59 (July 18, 2011) (urging the Commission to preempt the pricing terms of the contract that Level 3’s predecessor-in-interest entered into with the New York State Thruway Authority).

<sup>11</sup> *Id.* (addressing policies of New York State Thruway Authority); Comments of CenturyLink, WC Docket No. 11-59, at 8 (July 18, 2011) (criticizing policies of Elephant Butte Irrigation District).

years ago for use of publicly-owned property. Because the District has enormous interests in protecting its property and in providing for its use only through enforceable and predictable agreements, it files these comments in opposition.

## **II. DISCUSSION**

### **A. The Commission Cannot Interfere With the District's Ability to License Its Property at Market-Based Rates.**

The Commission may not use its authority under the Communications Act to interfere with the District's basic property rights, including its right to lease and/or license its property to third-parties at market-based rates, or to undo existing agreements. Nor may the Commission regulate the manner in which the District licenses its property, the terms of its agreements, or the speed with which it enters into such agreements. The Commission is limited by both statutory and constitutional principles.

First, the Commission long ago recognized that the Communications Act does not permit it to regulate entities like the District (or their property). It noted:

The Communications Act confers broad and expansive powers upon this Commission to regulate "all forms of electrical communication, whether by telephone, telegraph, cable, or radio." However, this authority is "not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority." . . . 3(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

We recognize that the question of our jurisdiction over pole and conduit arrangements made available to cable operators is a difficult one. It is only after careful review of the situation that we have concluded that this activity does not constitute "communication by wire or radio," and is thus beyond the scope of our authority. . . . The fact that the cable operator utilizes the poles for his cable does not justify the extension of our

authority over the pole owners as if they were "persons engaged in such communication or such transmission."<sup>12</sup>

The Commission emphasized that finding that it had broad authority to regulate property—including to set access and rents for antenna sites—would defy Congress' intent. According to the Commission, it

would bring under the Act activities never intended by Congress to be regulated. The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. *If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.* Such a reading comes close to the "affecting communications" concept rejected by the Commission and the seventh circuit in *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (1972).<sup>13</sup>

None of the amendments to the Act since 1977 changes this analysis, or gives the Commission authority over the District or its property. The Commission's decision in *California Water* led Congress to adopt Section 224 of the Act.<sup>14</sup> While this section gives the Commission authority to regulate pole attachment rates in cases where a State does not regulate them, the section specifically reaches only "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." The Commission has recently reaffirmed that Section 224 gives it no "authority to regulate . . . utilities that are municipally or cooperatively owned."<sup>15</sup> Indeed, Section 224 gives the FCC no authority whatsoever over publicly owned, cooperatively owned, or railroad property of any sort. The Commission has also suggested that Section 706 of the Telecommunications Act of 1996 allows it to regulate to promote broadband deployment, but

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<sup>12</sup> *California Water and Tel. Co.*, 64 FCC 2d 753, 758-59 (1977)(internal citations omitted).

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> 47 U.S.C. § 224.

<sup>15</sup> *In re Implementation of Section 224 of the Act et al.*, 25 FCC Rcd. 11864, 11957 (2010).



the Commission's authority under this statute does not "extend beyond [its] subject matter jurisdiction under the Communications Act."<sup>16</sup> As the Commission has already found, it has no subject matter jurisdiction over property merely because it is useful for communications purposes. Because the Commission has no authority over a California special district's property management, Section 706 cannot apply—even if one assumes that the section grants the Commission any substantive authority.<sup>17</sup>

Neither Section 253 nor Section 332(c)(7)<sup>18</sup> gives the Commission control over the District. Section 253(a) states that "no State or local statute or regulation, or other State or local legal requirement" may prohibit or have the effect of prohibiting *the ability* of any entity to provide any interstate or intrastate telecommunications service. Section 253(d), then defines how and under what circumstances the Commission may enforce this provision: if, "after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement" of the statute, regulation or legal requirement "to the extent necessary" to correct the violation of subsection (a) or (b). That is, the Commission only has narrow *preemptive* authority under Section 253.<sup>19</sup> It is well-established

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<sup>16</sup> *In re Preserving the Open Internet*, Report and Order, FCC 10-201, GN Docket No. 09-191, WC Docket No. 07-52, at ¶ 121 (Dec. 23, 2010).

<sup>17</sup> As the Commission is aware, there is substantial question as to whether the Commission may rely upon Section 706 as a source of regulatory authority. The Commission would be required to address these questions here should it choose to rely on the section to affect the District.

<sup>18</sup> 47 U.S.C. §§ 253, 332(c)(7).

<sup>19</sup> The Commission has no authority to decide cases that involve the safe harbor of Section 253(c).

that preemption applies only to “state regulation”—not proprietary—actions.<sup>20</sup> Courts have consistently recognized that in “determining whether government contracts are subject to preemption, the case law distinguishes between actions a state or municipality takes in a proprietary capacity—actions similar to those a private entity might take—and actions a state or municipality takes that are attempts to regulate. The former type of action is not subject to preemption while the latter is.”<sup>21</sup> The Telecommunications Act is subject to this maxim, and accordingly, the “Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity.”<sup>22</sup> Here, the District is not regulating at all. Instead, it would be entering into agreements for use of its property. This sort of action is simply not subject and could not be subject to preemption under Section 253, and Section 253 cannot be stretched to give the Commission *regulatory* authority over the management or pricing of the property.

Section 332(c)(7), titled “preservation of zoning authority” likewise only restricts local regulatory decisions, and therefore gives the Commission no power over proprietary acts. Thus, Section 332(c)(7)(A) states that nothing in the Act may affect “decisions regarding the placement, construction, and modification of personal wireless service facilities,” except as provided in Section 332(c)(7). The limitations on local authority are specified in Section 332(c)(7)(B), and those limitations only go to the “regulation of the placement, construction, and

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<sup>20</sup> *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993).

<sup>21</sup> *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000).

<sup>22</sup> *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only “regulatory schemes”); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993) (“[P]re-emption doctrines apply only to state regulation”).

modification of personal wireless service facilities,” not proprietary actions. In fact, the District has no regulatory authority over land use – it has no zoning powers. Indeed, like any private property owner, the District is subject to the local government zoning requirements, except in certain specific instances.<sup>23</sup>

Nor may the Commission attempt to regulate the District in light of its governmental or quasi-governmental status on the ground that its actions in managing or leasing or licensing its property interfere with interstate commerce (by discouraging broadband deployment). Attempting to do so would raise serious issues under the Tenth Amendment, which forbids the federal government from regulating the States directly. The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. The Supreme Court has consistently respected this choice. Hence, even where Congress has the authority to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. “The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”<sup>24</sup> It follows that the Commission may not direct the States (or their instrumentalities) to enter into agreements at a time and under conditions that the Commission prefers.

**B. Even If The Commission Had Authority To Do So, Interfering With The District’s Property Rights Would Not Advance Broadband Deployment.**

Even if the Commission had authority to interfere with the free market forces at work here (it does not), there is no defensible reason—and no practical way—to do so.

The District’s driving purpose—its *raison d’être*—is water service. It uses its property to deliver water to nearly 20,000 people. These are critical services in the community, and the

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<sup>23</sup> Cal. Gov’t Code § 53091.

<sup>24</sup> *New York v. United States*, 505 U.S. 144, 166 (1992).

District has only limited staff to provide those services. The District is already subject to excessive regulation with respect to the provision of services. There are strict State Constitution and statutory restrictions governing what rates it may charge for water and service expansion, as well as for other fees and charges that it may impose for permits and regulatory matters (the District has no general taxing authority in the same way that a State has general taxing authority). It faces significant environmental regulation, and must deal with a number of operational issues. It must protect the water supply against security threats. If the District did not protect its water supply from tampering or disruption, thousands of customers in the community could be impacted. And of course, the District must ensure that it can easily access its facilities, and ensure that those facilities are maintained in working order. It cannot manage its property on the theory that harms can be corrected later, and are of little consequence: a facility's failure can significantly affect the community. It is hard to imagine that the Commission could devise a set of federal rules that rationally balanced existing regulations and requirements, took into account the limited staff available to the District, and ensured that the District's highest purpose—reliable and safe water delivery at reasonable rates—is served.<sup>25</sup> This is true both with respect to the initial placement of facilities and with respect to collocation, which in the context of the District's operations, raise similar, and perhaps more complex issues of security, facility accessibility, and maintenance risk.

Nor is there any good reason for the Commission to adopt federal regulations merely

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<sup>25</sup> To give a small example: if the Commission established deadlines for acting on requests for facilities access, the District would likely be required to hire a property manager and staff to lease/license space and to monitor the ongoing use in anticipation of possible requests. Those costs would have to be recovered either from water customers (raising water rates and complicating water rate proceedings); the incumbents (increasing the rates that they are now paying); or via some other mechanism that the District would have to spend resources to develop. Any way one examines it, this activity, which may seem small to the Commission, would at worst increase rates, and at best create a significant distraction.

because the industry would prefer different terms and conditions for service. The District is very interested in licensing its property to providers, and has no incentive to deter broadband deployment. The Commission should not interfere with a model that promises to both promote the deployment of wireless services and protect the District and its customers. Instead, the Commission can most effectively encourage leasing and licensing by rejecting the regulatory approach urged by the telecommunications industry.

While the leasing and licensing of space for wireless telecommunications facilities would boost the District's general revenues, it would be a purely ancillary activity, which cannot disrupt the District's primary purpose in any way. For safety, operational, and other reasons, the District will need to limit the number of facilities that can be placed at any site, and it must do so on a case-by-case basis. Each telecommunications facility added to District property (including collocated facilities) will be accompanied by additional ground equipment, and additional personnel that must access the District's property. Moreover, the District has limited staff, and it is not in a position to dedicate personnel exclusively to the siting needs or ongoing requirements of telecommunications carriers.

The District plans to price its property much like any private property owner. The District would then use the funds it recovers through these lease arrangements to offset its costs and/or to reduce the amount of future water rate increases. The District has no interest in leasing/licensing its property in exchange for the recovery of its costs alone. Doing so would not benefit the District or its customers, and it would not adequately compensate the District for the burdens and risks that necessarily coincide with allowing third parties to use District property.<sup>26</sup> Similarly, if the Commission were to threaten to preempt existing leases and licenses (including the price

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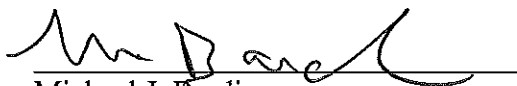
<sup>26</sup> *See, infra.*

terms, as some entities have proposed),<sup>27</sup> the District would have little or no incentive to enter into such agreements at all. Regulation, in short, is likely to create significant new risks that would actually discourage the District from leasing/licensing its property.<sup>28</sup>

### III. CONCLUSION

Contrary to the industry's suggestion, there is no need (or authority) for the Commission to regulate the terms and conditions of access to property owned by public agencies. Access is being provided now, and over-regulation would create security and other risks, and discourage entities like the District from opening their property to third parties. The Commission therefore may not and should not affect the District's ability to set market-based rates for use of its property, or to control how third parties use or access this property whether for initial placement or collocation.

Respectfully submitted,



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September 28 2011

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<sup>27</sup> See, e.g., Comments of Level 3 Communications, LLC, WC Docket No. 11-59 (July 18, 2011)

<sup>28</sup> It is worth stressing that the District's property is similar to structures and property owned by many private property owners. There is no basis for concluding that the absence of access rights would in fact discourage broadband deployment. In fact, a fair reading of some of the wireless industry's comments (as well as the Commission's own NOI) suggests that there are alternatives for placement of facilities – it would just be more convenient and cheaper if the Commission regulated terms and conditions for access to property owned by local agencies. Presumably, it would also “encourage deployment” if the Commission asserted control over every piece of private property – including the rooftops of private homes. This is not suggested because not even the wireless industry can suggest that the Commission has that authority. But the Act gives the Commission no more authority over the District's property than it provides over private homes.